

**IN THE SUPREME COURT OF MISSOURI
SC94372**

ANGELA ANDERSON
Appellant

v.

UNION ELECTRIC COMPANY
Respondent

BRIEF OF AMICUS CURIAE

**MISSOURI ASSOCIATION OF TRIAL ATTORNEYS
IN SUPPORT OF APPELLANT**

APPEAL FROM THE CIRCUIT COURT OF MORGAN COUNTY
The Honorable Kenneth Michael Hayden, Circuit Judge
No. 13MG-CC00034; WD76927

THERESA A. APPELBAUM
PADBERG, CORRIGAN & APPELBAUM
1926 Chouteau Avenue
St. Louis, MO 63103
314.621.2900 (telephone)
314.621.7607 (facsimile)
taa@padberglaw.com

Attorney for Amicus Curiae
Missouri Association of Trial Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
CONSENT OF PARTIES	2
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS	4
POINTS RELIED ON.....	5
ARGUMENT	6
I. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS BECAUSE THE IMMUNITY GRANTED BY MO.REV.STAT. § 537.345, ET SEQ (THE RECREATIONAL USE ACT) DOES NOT APPLY IN THAT	6
(A) A USER/PERMIT FEE WAS CHARGED BY DEFENDANT; AND	8
(B) THE AREA IN WHICH THE INJURY OCCURRED IS “NON-COVERED LAND” WITHIN THE MEANING AND PURPOSE OF THE RECREATIONAL USE ACT AND IS THEREFORE EXCLUDED FROM THE IMMUNITY GRANTED BY THE RECREATIONAL USE ACT.....	12
CONCLUSION	20
CERTIFICATE OF COMPLIANCE	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

Missouri Cases

<i>Foster v. St. Louis County</i> , 239 S.W.3d 599 (Mo.banc 2007).....	11
<i>Lastra v. Intercontinental Inv. Co., Inc.</i> , 745 S.W.2d 703 (Mo.App.W.D. 1987).....	8
<i>Lonergan v. May</i> , 53 S.W.3d 122 (Mo.App.W.D. 2001).	6, 7, 9, 12, 13, 16, 18
<i>Overcast v. Billings Mutual Ins. Co.</i> , 11 S.W.3d 62 (Mo. 2000).	8, 10

Missouri Revised Statutes

§537.345 et. seq.	6, 7, 8, 12
------------------------	-------------

Other Jurisdiction Cases

<i>Dorrah v. U.S.A.</i> , (N.D. Iowa, 2012).	9
<i>Hughey v. Grand River Dam Authority</i> , 897 P.2d 1138 (Okla. 1995).....	16, 17
<i>Nielsen v. Port of Bellingham</i> , 27 P.3d 1242 (Wash.App. 2001).	14, 16
<i>Schmidt v. Gateway Community Fellowship</i> , 781 N.W.2d 200 (N.D. 2010).	15, 16

INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit organization consisting of approximately 1400 trial attorneys in Missouri and other states. For more than half a century, MATA members have advanced the interests and protected the rights of individuals throughout the State of Missouri. MATA members have dedicated themselves to promoting the administration of justice, preserving the adversary system, and ensuring that those citizens of our state with a just cause will be afforded access to our courts.

MATA members are interested in this case because they are concerned that the granting of immunity to corporations from their own negligence by statute affects access to the courts for citizens of our state. The judicial extension of immunity, greater than that presented by the legislature, affects not only the current Plaintiff in this case, but also future and unknown plaintiffs.

This Amicus Curiae brief is submitted in support of the Plaintiff (Appellant) and addresses the issues presented for review in a broader and different perspective than the perspectives presented by the parties. In particular, MATA wishes to supplement Respondents' arguments by emphasizing and underscoring the significant policy considerations concerning the Recreational Use Act.

CONSENT OF THE PARTIES

MATA has received consent from counsel for Plaintiff-Appellant. MATA has requested consent from counsel for Respondent; however, Respondent's counsel has not received consent from the Respondent as of the filing of this matter.

JURISDICTIONAL STATEMENT

MATA adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

MATA adopts Appellant's Statement of Facts.

POINT RELIED ON

- I. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS BECAUSE THE IMMUNITY GRANTED BY MO.REV.STAT. § 537.345, ET SEQ (THE RECREATIONAL USE ACT) DOES NOT APPLY IN THAT (A) A USER/PERMIT FEE WAS CHARGED BY DEFENDANT; AND**

<i>Foster v. St. Louis County</i> , 239 S.W.3d 599 (Mo.banc 2007).	11
<i>Lonergan v. May</i> , 53 S.W.3d 122 (Mo.App.W.D. 2001).	6, 7, 9, 12, 13, 16, 18
<i>Overcast v. Billings Mutual Ins. Co.</i> , 11 S.W.3d 62 (Mo. 2000).	8, 10
<i>Dorrah v. U.S.A.</i> , (N.D. Iowa, 2012).	9

- (B) THE AREA IN WHICH THE INJURY OCCURRED IS “NON-COVERED LAND” WITHIN THE MEANING AND PURPOSE OF THE RECREATIONAL USE ACT AND IS THEREFORE EXCLUDED FROM THE IMMUNITY GRANTED BY THE RECREATIONAL USE ACT.**

<i>Lonergan v. May</i> , 53 S.W.3d 122 (Mo.App.W.D. 2001).	6, 7, 9, 12, 13, 16, 18
<i>Overcast v. Billings Mutual Ins. Co.</i> , 11 S.W.3d 62 (Mo. 2000).	8, 10
<i>Hughey v. Grand River Dam Authority</i> , 897 P.2d 1138 (Okla. 1995).	16, 17
<i>Nielsen v. Port of Bellingham</i> , 27 P.3d 1242 (Wash.App. 2001).	14, 16
<i>Schmidt v. Gateway Community Fellowship</i> , 781 N.W.2d 200 (N.D. 2010).	15, 16

ARGUMENT

- I. **THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS BECAUSE THE IMMUNITY GRANTED BY MO.REV.STAT. § 537.345 , ET SEQ (THE RECREATIONAL USE ACT) DOES NOT APPLY IN THAT (A) A USER/PERMIT FEE WAS CHARGED BY DEFENDANT; AND (B) THE AREA IN WHICH THE INJURY OCCURRED IS “NON-COVERED LAND” WITHIN THE MEANING AND PURPOSE OF THE RECREATIONAL USE ACT AND IS THEREFORE EXCLUDED FROM THE IMMUNITY GRANTED BY THE RECREATIONAL USE ACT.**

The Recreational Use Act (hereinafter referred to as “RUA”) provides immunity from tort liability of a landowner so long as the landowner does not charge a fee.

Lonergan v. May, 53 S.W.3d 122, 127 (Mo.App.W.D. 2001). It provides as follows:

Except as provided in §§ 537.345 – 537.348 and § 537.351, an owner of land owes no duty of care to any person who enters on the land **without charge** to keep his land safe for recreational use or to give any general specific warning with respect to any natural or artificial condition, structure, or personal property thereon.

R.S.Mo. § 537.346 (Emphasis added).

R.S.Mo. § 537.347 provides:

Except as provided in §§ 537.345 – 537.348, an owner of land who directly or indirectly invites or permits any person to enter his or her land for **recreational use, without charge**, whether or

not the land is posted, or who directly or indirectly invites or permits any person to enter his or her land for recreational use in compliance with a state-administered recreational access program, does not thereby:

- (1) Extend any assurance that the premises are safe for any purpose;
- (2) Confer upon such person the status of an invitee, or any other status requiring of the owner a duty of special or reasonable care;
- (3) Assume responsibility for or incur liability for any injury to such person or property caused by any natural or artificial condition, structure, or personal property on the premises; or
- (4) Assume responsibility for any damage or injury to any other person or property caused by an act or omission of such person.

(Emphasis added).

According to *Lonergan*, the purpose of the Act is to “encourage landowners to open their lands to the public for recreational use by restricting the landowners’ liability.” *Id* at 127. Thus, the RUA creates an immunity for landowners from their common law obligations as owners and occupiers of land.

Since the RUA abrogates a common law cause of action, it must be strictly construed. *Overcast v. Billings Mutual Ins. Co.*, 11 S.W.3d 62, 69 (Mo.banc 2000)(Statutes displacing common law remedies are to be strictly construed.”). If there is any ambiguity or if the question is a close one, “the balance should be struck in favor of retaining the common law remedy.” *Id.* citing *Lastra v. Intercontinental Investment Co., Inc.*, 745 S.W.2d 703, 708 (Mo.App.W.D. 1987).

The cause of action as alleged by the Plaintiffs/Appellants pleads facts which exclude their cause of action from the immunities granted in the RUA in that (a) the Defendant/Respondent charged a user/permit fee, and (b) the portion of the lake where the fatal injuries took place was “non-covered land” within the meaning of the RUA. As a result, the trial court erred in granting Defendant’s Motion to Dismiss.

(A) Defendant charged a user/permit fee which precludes the immunity provided under the Recreational Use Act.

The Plaintiff’s Petition alleges that Defendant fails to fall within the class of land owners provided by the RUA because the Defendant charged a user/permit fee. Consequently, the Defendant has “charged” for the use of its land precluding it from the immunity granted by the RUA.

Section 537.345(1) defines “charge” as “The admission price or fee asked by an owner of land or an invitation or permission without price or fee to use land for recreational purposes when such invitation or permission is given for the purposes of sales promotion, advertising or public good will in fostering business purposes.”

The Plaintiff’s Petition alleges that Union Electric charged a “fee” to the

Andersons to use their docks to access the Lake of the Ozarks. Said fee was charged either annually or by a lump sum user/permit fee. In addition, the dock owners, including the Andersons, were required to have dock permits issued by the Defendant complying with all permitting requirements subject to enforcement fees if they failed to do so.

The question before this Court is whether the user/permit fees paid by the dock owners at the Lake of the Ozarks allowing them to use the Lake of the Ozarks at or around their dock, constitutes a “charge” as that term is defined in the RUA, referred to above. This is a matter of first impression in the State of Missouri. However, the court in *Lonergan v. May*, 53 S.W.3d 122 (Mo.App.W.D. 2001) provides guidance in this matter. As in the instant matter, in *Lonergan*, the court addressed the application of the RUA with regard to Union Electric and the Lake of the Ozarks. The *Lonergan* court noted specifically that Union Electric issued dock permits free of charge. *Id.* at 125. The logical inference is that the *Lonergan* court would have held differently if Defendant charged for the dock permits. In the instant matter, the allegation is that the owners of the docks were charged a permit or user fee. Therefore, applying *Lonergan* to the facts in the instant matter clearly removes Union Electric from the immunities provided under the RUA.

Other jurisdictions have addressed the application of similar recreational use acts as well and have agreed with such application. In *Dorrah v. U.S.A.*, (N.D. Iowa, 2012), the Northern District of Iowa held its RUA, “May not be limited to an entry fee but may include other types of consideration.” In so holding, the Northern District of Iowa held that the purpose of the recreational use immunity is to limit the liability of those who

allow others onto their property as a public service, not to provide immunity to those who provide recreational activities for commercial gain. “If a recreational use is incidentally provided as part of a larger commercial scheme, the policy motivating recreational use immunity is no longer applicable.”

Such is the case with the Lake of the Ozarks and Union Electric. The larger commercial scheme is the hydroelectricity which is generated and sold by the Defendant Union Electric. In exchange for being granted the land to generate the electricity, Union Electric allows the public use of the Lake for recreational purposes without charge. However, Union Electric also owns the shoreline of the lake and charges private dock users a permit fee for the use of said docks on the Lake and requires compliance with the restrictions placed on the dock permits. As such, the RUA, being strictly construed, should provide no immunity to Union Electric under the circumstances of this case.

The Defendant argues that “charge” must be an admission price charged each time that someone enters the Lake. However, such an interpretation requires a liberal interpretation of the RUA, something which this Court has prohibited in *Overcast v. Billings Mutual Ins. Co.*, *supra*.

The Defendant further argues in its Application for Transfer that allowing the Plaintiff to proceed in this case would conflict with prior decisions and have far-reaching effects on the interests of the people of Missouri, including scouting groups, church groups, counties and other governmental agencies. However, that is not the case. Each of these RUA cases must be viewed in light of the individual facts of each case.

The law is clear that there must be a nexus between the fee charged and the injury

sustained by the plaintiff which resulted in the claim. For instance, in *Foster v. St. Louis County*, 239 S.W.3d 599 (Mo.banc 2007) the plaintiff claimed that the RUA did not apply to St. Louis County because St. Louis County charged a fee for the use of certain picnic areas in the park in which the plaintiff was injured. However, the plaintiff did not sustain injury resulting from the use of the pavilions. Rather, the plaintiff fell in an open field for which there was no charge for use. *Id.* at 602. Clearly, there was no nexus between the fee charged and the injury sustained by the plaintiff.

On the contrary, in the instant matter, the Plaintiffs' children were killed when they were shocked by stray electric currents while swimming off of the dock for which user/permit fees were paid. There is a clear and logical nexus between the fees charged by the Defendant and the damages sought in this claim. As such, the argument by the Defendant that exempting Defendant from the RUA would have far-reaching affects to scouts, church groups, or local governmental entities is not grounded in fact.

No one is suggesting that Defendant Union Electric must meticulously maintain every inch of the surface waters of the Lake of the Ozarks. If the plaintiff was injured because a boat struck a sandbar in the lake, or two boats collided because of poor lighting at night in the middle of the lake, there would be no logical nexus between the fees charged by Union Electric and the damages claimed. However, for the portions of the Lake that Union Electric does charge a user/permit fee, it should not be immune from liability for its alleged negligence. The Missouri Court of Appeals for the Western District agreed.

Allowing such immunity would render the common law duties toward commercial

invitees meaningless and would not be consistent with the purpose of the immunity granted in the RUA.

(B) The area in which the injury occurred is “non-covered land” within the meaning and purpose of The Recreational Use Act and is therefore exempted from the immunity granted by The Recreational Use Act.

The RUA provides no immunity for injuries which occur on “non-covered land.”

The RUA defines “non-covered land” as follows:

“**Non-covered land**” as used herein, means any portion of any land, the surface of which portion is actually used primarily for commercial, industrial, mining or manufacturing purposes; provided, however, that use of any portion of any land primarily for agricultural, grazing, forestry, conservation, natural area, owner’s recreation or similar or related uses or purposes shall not under any circumstances be deemed to be use of such portion for commercial, industrial, mining or manufacturing purposes.

R.S.Mo. § 537.348(3)(d).

The purpose in granting the immunity to landowners through the RUA is tied to the gratuitous opening of property to the public. *Loneragan* at 129. The law is clear that a landowner will not be immune from liability for those portions of its land which the owner uses primarily for commercial purposes. *Loneragan* at 129. It was never the intention of the legislature to create immunity for commercial entities simply because their enterprise is recreational in nature.

Although *Loneragan* held that Union Electric’s use of the Lake of the Ozarks for

the overall purpose of the generation of hydroelectric power was not a commercial purpose, the *Lonergan* court did not address whether Union Electric's regulation of private dock owners on the Lake of the Ozarks constitutes a commercial use of the land. As indicated above, there is no question that charging fees and granting permits constitutes a commercial purpose by the defendant.

Clearly, there is a dual purpose for Union Electric's use of the Lake of the Ozarks. One is to generate hydroelectricity from the water for which it allows the public to enter the water free of charge for recreational purposes. This was the use addressed by the *Lonergan* court. The other use is also commercial—to regulate the shoreline by demanding permit fees and user fees from the private dock users on the shoreline, and to require these private dock users to comply with Defendant's requirements or be subject to further fees. Generating income through the charging of permit and usage fees as well as other fines is clearly a commercial purpose. The clear language of the RUA exempts Union Electric under such circumstances as does the purpose behind its passage.

As indicated above, there must be a nexus between the commercial use of the land and the injuries and damages alleged in the pleadings. While in *Lonergan*, there was no nexus between the injuries sustained by the plaintiff and the commercial use of the land by Union Electric, there is a clear nexus between the commercial use by Defendant Union Electric (the granting of permits and charging user/permit fees for dock owners) and the damages alleged in the instant matter. The Anderson children were swimming from a dock which Union Electric regulated, for which Union Electric charged user and permit fees and issued permits. Had there been no dock, there would have been no stray

electrical current in the water in close proximity to the dock and the Anderson children would not have drowned. The tragic loss of the Anderson children was directly connected to the Defendant's commercial use of the land by its granting of permits and charging user/permit fees for the private docks on the Lake.

As a result, the use of this portion of the Lake by Union Electric was for commercial purposes causing this portion of the Lake to be non-covered land pursuant to the RUA.

This is an area of first impression in the State of Missouri. However, other states provide some guidance when construing similar recreational use acts. The Supreme Court of the State of Washington in *Nielsen v. Port of Bellingham*, 27 P.3d 1242 (Wash.App. 2001) held that the grant of immunity by Washington's Recreational Use Act covers "injuries to members of the public who are using the property for the purposes of outdoor recreation." *Id.* at 1244. However, the plaintiff in the *Nielsen* case was not on the property as a member of the public. The plaintiff was on the property visiting a friend who lived on a yacht which was moored at the marina for which the owner of the yacht paid a moorage fee. The Washington Supreme Court held that under the circumstances of the *Nielsen* case, the Recreational Use Act did not apply because, although the marina could be used for recreational purposes free of charge, it also had a dual purpose of charging moorage fees which was primarily commercial. *Id.* at 1245. Under this "dual purpose" doctrine, the defendant may be immune to the general public for recreational purposes, but would not be immune when the plaintiff is injured while using the marina to visit a friend who had paid a moorage fee to the defendant. According to the *Nielsen*

court, the injury resulted from the Defendant's commercial use of the land. Therefore, the defendant was not immune under such circumstances. *Id.*

The facts in *Nielsen* closely resemble the facts in the instant case in that there is a clear nexus between the commercial activity of the Defendant and the injuries and damages alleged in the pleadings. In *Nielsen*, the plaintiff was walking on the same marina on which many others walked free of charge. However, because the plaintiff was visiting a person for which the defendant charged moorage fees, the relationship changed between the defendant and the plaintiff in that the relationship was no longer gratuitous but was commercial which removed the defendant from the immunities provided under the Recreational Use Act.

Similarly, in the instant case, because the Plaintiffs were swimming off of a dock for which the Defendant charged user/permit fees, the nature of the relationship between the Defendant and the Plaintiffs changed from recreational use to commercial use of the property, thus removing any immunity provided to the Defendant by the RUA.

Similarly, in *Schmidt v. Gateway Community Fellowship*, 781 N.W.2d 200 (N.D. 2010), the Supreme Court of North Dakota held that the Recreational Use Act provided no immunity to a landowner for injuries sustained by a woman who fell on an area of a mall parking lot for an exhibition which was provided to the public free of charge. Both the landowner and church sponsor claimed they were shielded by the Recreational Use Act in that the land was open to the public without charging a fee. The Supreme Court of North Dakota disagreed. The North Dakota Supreme Court held that a factual issue existed as to whether there was commercial use of the property removing it from the

immunities provided by North Dakota's Recreational Use Act. *Id.* at 209. In support of its decision, the court noted that there was evidence that the Gateway Community Fellowship charged sponsor fees for the exhibition which did not constitute "An amount of money asked in return for an invitation to enter or go upon the land," but were factors to consider in determining the purpose of the exhibition from the perspective of Gateway Community Fellowship. The Supreme Court of North Dakota adopted a balancing test for mixed uses of the land. Such balancing tests created an issue of fact as to whether the defendants were entitled to immunity under the Recreational Use Act. *Id.*

Clearly, as in *Nielsen* and *Schmidt*, Defendant Union Electric had mixed uses of the Lake of the Ozarks. Much of the lake was for recreational use only. Other areas were for commercial use. By charging permit fees and user fees to dock owners at the Lake of the Ozarks, and by regulating the use of docks on the Lake, Defendant was using that portion of the Lake for commercial purposes. As such, that portion of the Lake is non-covered land pursuant to the RUA and, therefore, excepted from the immunity granted by the RUA for injuries sustained from the use of such docks and the areas surrounding the docks.

Such analysis is also consistent with the *Hughey v. Grand River Dam Authority* case which was relied on heavily by the *Lonergan* court. *Lonergan*, 53 SW3d at 132, citing *Hughey v. Grand River Dam Authority*, 897 P.2d 1138 (Okla. 1995). As noted in *Lonergan*, the plaintiff in the *Hughey* case drowned after his boat struck an abandoned railroad bridge at night. The *Hughey* court held that although the defendant used the lake for commercial purposes (the generation of hydroelectricity), there was no nexus between

the generation of hydroelectricity and the poorly lit railroad bridge. The *Hughey* court held “the type of commercial activity which takes a landowner out of the purview of immunity must be connected with the invitees’ recreational use of the lands or waters.” *Id.* at 132.

This case is distinguishable from *Hughey* and *Loneragan* in that the nexus between the commercial activity of Union Electric and the plaintiff’s use of the land or waters in the instant matter is clear. Therefore, the RUA does not apply to Union Electric under the circumstances of this case.

In finding the RUA does not apply, this Court would clearly be following the legislative intent for the RUA—to encourage landowners to gratuitously open their lands to the public for recreational use by restricting the landowners’ liability. However, when the defendant has a commercial purpose for the land, the legislature purposely removed the immunities granted by the RUA by establishing the “non-covered land” exception to the RUA. Clearly, the legislature did not intend for the RUA to grant immunity to owners of land for causes of action resulting from the owner’s commercial use of the land. This is precisely what the defendant is attempting to do in the instant action. It is attempting to shield itself from liability for the commercial use of the land. Defendant attempts to accomplish this goal by suggesting to this Court that holding otherwise would expose scout groups, churches and local governments to liabilities by removing them from the immunities granted by the RUA. However, holding Union Electric exempt from the RUA for its commercial use of this portion of the Lake would not defeat the purpose of the RUA and certainly would not deprive scout groups, churches and local

governments of the immunities granted by the RUA. In fact, holding Defendant Union Electric exempt from the RUA under the circumstances of this case is completely consistent with the legislative purpose of the RUA and the cases addressing the ACT to date.

The *Lonergan* court also addressed certain public policy considerations which must be addressed to the facts of this case. In *Lonergan*, the Court indicated that “it is inconceivable that UEC could meticulously maintain every inch of the surface waters of the Lake of the Ozarks.” *Id.* at 132. However, such a concern does not arise in the instant matter. Here, Defendant Union Electric is already regulating the areas in question by regulating the dock owners, issuing permits and requiring compliance with the requirements for dock usage. This is an area that is already regulated by the Defendant and would not impose additional hardship on the Defendant.

The *Lonergan* court also noted that the Lake was available for people all over the country and was open to everyone “so that no one is excluded.” *Id.*

However, the instant matter involved children swimming off of a private dock which was regulated by the Defendant Union Electric. It did not involve a public dock for anyone to use free of charge. The private dock was regulated by the Defendant and fees were paid to the Defendant for its use. The permitting requirements put in place by Defendant Union Electric also necessarily mean some members of the public are excluded from access. Consequently, the policy considerations referred to in *Lonergan* have no application in the instant matter.

CONCLUSION

The purpose and plain language of Missouri's Recreational Use Act does not provide immunity to owners of land who charge a fee to its users when the cause of action is connected to the use for which a fee was charged, and it does not provide immunity to owners of land for portions of the land or water that are used primarily for commercial purposes when the cause of action is connected to the commercial purpose. Since the pleadings in the instant matter allege that a fee was charged for the dock permits and that the Defendant used the land or water at issue for commercial purposes, and the cause of action is connected to the Defendant's commercial purpose, the Recreational Use Act does not apply to the instant cause of action.

Therefore, we strongly urge this Honorable Court to reverse the Trial Court's dismissal of the instant matter and remand the case for trial on the merits.

Respectfully submitted,

PADBERG, CORRIGAN & APPELBAUM
Attorney for Amicus Curiae
Missouri Association of Trial Attorneys

/s/ Theresa A. Appelbaum
 Theresa A. Appelbaum, #45706
 1926 Chouteau Avenue
 St. Louis, MO 63103
 314.621.2900
 314.621.7607 (facsimile)
taa@padberglaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and that the brief contains 3,730 words (as determined by Microsoft Office Word 2010 software).

/s/ Theresa A. Appelbaum

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following, and further that I sent an electronic copy hereof by email to:

VIRTEL , JAMES J. , Attorney for Respondent
BAUDENDISTEL , KAREN ALICE , Co-Counsel for Respondent
MCPHERSON , JEFFERY THOMAS , Co-Counsel for Respondent
SUITE 1800
7700 FORSYTH BOULEVARD
ST. LOUIS, MO 63105

DAVIDSON , KEVIN J. , Attorney for Appellant
ZEVAN , DAVID MICHAEL , Co-Counsel for Appellant
ROMAN , RACHEL LYNN , Co-Counsel for Appellant
C/O KEVIN J. DAVIDSON
ONE NORTH TAYLOR AVENUE
SAINT LOUIS, MO 63108

/s/ Theresa A. Appelbaum